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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1968

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IRVING NAPUE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SAM ADAM
134 North LaSalle St.
Suite 1622
Chicago, Illinois 60602
CEntral 6-5543

R. EUGENE PINCHAM
EARL E. STRAYHORN
CHARLES B. EVINS
840 E. 87th Street
Suite 201
Chicago, Illinois 60619
994-2600

Attorneys for Petitioner Irving Napue.

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To the Honorable, The Chief Justice, and the Associate Justices of the Supreme Court of the United States.

OPINION BELOW

Petitioner, IRVING NAPUE, was found guilty by a jury, in the United States District Court for the Northern District of Illinois, Eastern Division, for the unlawful concealment of a narcotic drug on December 7, 1964 at Chicago, Illinois, in violation of Title 21, Section 174, United States Code. Judgment was entered on the finding and petitioner was sentenced to six years imprisonment. No opinion was rendered by the District Court.

Over the dissent of Judge Swygert, (App. 24-30)[1], a divided United States Court of Appeals for the Seventh Circuit affirmed the judgment of conviction in an opinion by Judge Win G. Knoch, (App. 1-23), which was hardly unpredictable in that Judge Knoch has authored only two opinions favorable to the defendant out of the 234 criminal and habeas corpus cases on which he sat during his ten year tenure on the Court.[2] The instant opinion is yet unreported.

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1. (App. 24-30) refers to the pages of the opinions, appended hereto.

2. The only two criminal reversal opinions by Judge Knoch are U.S. vs. Mesheski, 286 Fed. 2d. 345, and U.S. vs. Wilcher, 332 Fed. 2d. 117. The citations of the 234 criminal and habeas corpus cases on which he has sat and the pro-prosecution opinions authored by him are set forth in the appendix, pages 33-36.

JURISDICTIONAL STATEMENT

The opinions and judgment of the Court of Appeals, sought to be reviewed, were rendered on September 6, 1968, four and one-half months after oral argument. The Petition for Rehearing was denied on October 14, 1968. Judge Swygert voted for rehearing.

This Court's jurisdiction is conferred by Title 28, Section 1254 (1), United States Code., 62 Stat. 928.

QUESTIONS PRESENTED

Does the majority decision of the United States Court of Appeals for the Seventh Circuit in the case at bar, that it was harmless error for the trial court to refuse to instruct the jury on identification - petitioner's theory and sole defense of the case, conflict with the decision of the United States Court of Appeals for the District of Columbia, in Salley vs. U.S., (1965), 353 Fed. 2d. 897, 898-899, in which on literally identical but stronger incriminating facts, the judgment of conviction was reversed because of the trial court's refusal to instruct the jury on identification; and does not the instant majority decision likewise conflict with the court's own decision in U.S. vs. Dichiarinte, (7th Cir., 1967), 385 Fed. 2d. 333, and U.S. vs. Indian Trailer Corp., (7th Cir.), 226 Fed. 2d. 595, 598, and the

decisions of the United States Court of Appeals for the Fifth Circuit in U.S. vs. Strauss, (1967), 376 Fed. 2d. 416, 419, and Bryan vs. U.S., 373 Fed. 2d. 403, and Levine vs. U.S., (D.C. Cir., 1958), 261 Fed. 2d. 747?

II.

Do not the holdings of the Court of Appeals in the instant case, (and in U.S. vs. Panczko, 367 Fed. 2d. 737; U.S. vs. Evans, 385 Fed. 2d. 824, 826; U.S. vs. Deloney, 389 Fed. 2d.), that the trial court did not err in denying petitioner's motions,

> (a) for a hearing on the unreasonableness and purposefulness of the government's pre-arrest and pre-indictment delays and the attendant prejudice to petitioner's defense,
>
> (b) to dismiss the indictment if the delays were unreasonable and purposeful or prejudicial to petitioner's defense,
>
> (c) for a bill of particulars of the approximate time and place of the offense, because of the delays and attendant prejudice to petitioner's defense,

conflict with the diametrically opposite holdings of the Court of Appeals for the District of Columbia in Ross vs. U.S., 349 Fed. 2d. 210; Lee vs. U.S., 368 Fed. 2d. 469; Woody vs. U.S., 370 Fed. 2d. 214, 216-217;

Nickens vs. U.S., 323 Fed. 2d. 808, 812-814; Godfrey vs. U.S., 358 Fed. 2d. 850?; and did the government's pre-arrest and pre-indictment delays violate Rule 48 (b) of the Federal Rules of Criminal Procedure and petitioner's Sixth Amendment constitutional right to a speedy trial and compulsory process for obtaining witnesses in his favor?

III.

Does the Court of Appeals' persistent clinging to the antiquated and discarded "particularized need showing" as a pre-requisite for production of government witness' grand jury testimony conflict with This Court's holdings in Dennis vs. U.S., 384 U.S. 855, 16 L. Ed. 2d. 973, 985-987; Worthy vs. U.S., 352 Fed. 2d. 718, 384 U.S. 894, 16 L. Ed. 2d. 1000; Leon v. U.S., 347 Fed. 2d. 486, 16 L. Ed. 2d. 994; Natl. Dairy vs. U.S., 350 Fed. 2d. 321, 16 L. Ed. 2d. 995, 384 U.S. 883; U.S. vs. Konisberg, et. al., 354 Fed. 2d. 1007, 16 L. Ed. 2d. 997; 384 U.S. 884?; and, can the government circumvent and defeat This Court's holdings of a defendant's right to a government witness' grand jury testimony in these cases merely by the government's refusal to record such testimony, or, by an agent-witness' convenient inability to recollect whether he testified before the grand jury?

IV.

Under the facts and circumstances of this case, does the holding of the Court of Appeals, that it was not error or an abuse of

discretion for the trial judge to instruct the jury that petitioner's testimony may be discredited and impeached and his credibility affected by evidence of a felony conviction, conflict with the holdings of the Court of Appeals for the District of Columbia in Brown vs. U.S., 370 Fed. 2d. 242, and Luck vs. U.S., 348 Fed. 2d. 763, 766-769; and the Seventh Circuit in U.S. vs. Steinbeck, 10/14/68, No. 16259, P. 5-7; U.S. vs. Pinna, 229 Fed. 2d. 216, P. 219?

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment Six:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Rule Involved - Rule 48 (b) of the Federal Rules of Criminal Procedure:

"DISMISSAL BY THE COURT. If there is unnecessary delay in presenting the charge to a grand jury on filing an information against a defendant who has been held to answer to the District Court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

STATUTE INVOLVED:

TITLE 21, SECTION 174, UNITED STATES CODE.

Because of its length this Statute is set out at page 31 of the Appendix.

STATEMENT OF THE CASE

The basis for Federal jurisdiction in the court of first instance was the return of the indictment by the United States District Court Grand Jury which alleged the commission of a federal offense, to-wit: Title 21, Section 174, United States Code.

Federal Narcotic Agent Vernon D. Meyer testified that on December 7, 1964 at or about 8:20 P.M., while he was parked ten car lengths from 8352 S. Ellis Avenue, a multiple resident apartment building, he observed a person, who he identified as petitioner, exit said building, enter a livery taxi cab, the license number and automobile make and model which he did not know. He followed the cab to 8352 S. St. Lawrence Avenue where he observed the person exit the cab, enter the building, later exit the building and return to 8352 S. Ellis. All of Agent Meyer's observations were made from his automobile and there was no evidence that he had ever seen this person previously. (A.12-13).

Federal Narcotic Agent DeFauw testified that he was parked in his vehicle four car lengths from the entrance to 8352 S. St. Lawrence, with other cars parked in front of him and the St. Lawrence address. It was dark. The weather was cold, and although there was snow on the ground he did not recall whether it was actually snowing at the time that he observed

a livery cab pull up and double park in front of 8352 S. St. Lawrence Avenue. A person exited from the cab and entered that address. Agent DeFauw identified this person as petitioner. He observed this person later exit the premises, enter the cab, which he followed three or four lengths behind, with three or four cars in front of him, to 8352 S. Ellis, into which the person entered. All of Agent DeFauw's observations were likewise made from his automobile from a minimum distance of four car lengths, and there was likewise no evidence that he had ever seen this person previously. (A.11-12)[3].

Federal Narcotic Agent Donald W. Tucker testified that he peeped around a half-opened wooden door, while standing on the interior basement stairs which led into the first floor apartment, and saw the profile view of a person, who he identified as petitioner, hand a package to Mildred Howell. The package was later given to him by Mildred Howell in the basement of the building. The package contained the narcotic drug which petitioner was found guilty of concealing. There was no evidence that Agent Tucker

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3. (A.11-12) refers to the Appendix to the record in the Court of Appeals, transmitted herewith.

had ever previously seen this person that he identified as petitioner. It should be here noted that the majority opinion's comment that "the record shows a reference to the defendant having seen Agent DeFauw on September 15, 1965." , (App. 12), refers to a time nine months after the date on which the instant offense was allegedly committed, to-wit: December 7, 1964. (A.7-10).

Petitioner testified that he could not recall where he was on December 7, 1964, but that he was not in 8352 S. St. Lawrence Avenue on that date or on any other date, and that it was not he who exited a cab and entered those premises and dispensed the narcotic drug to Mildred Howell; that he was 30 years of age and had been gainfully employed continuously for 17 years. Petitioner denied the commission of the offense.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

REFUSAL TO INSTRUCT ON PETITIONER'S DEFENSE

The instant decision conflicts with the decision of the Court of Appeals for the District of Columbia in Salley vs. U.S., 353 Fed. 2d. 897, 898-899, on the trial court's refusal to instruct the jury on petitioner's defense and

theory of the case. The evidence in the case at bar was exceedingly close. The government's evidence was far from overwhelming. It was petitioner's total defense that the agents were mistaken in their identity of him as the person who dispensed the narcotic drugs. Petitioner was entitled to an instruction on his theory and defense. The court refused petitioner's instructions on identity. (A.31-32). The Court of Appeals held such refusal to be harmless error on the nebulous ground that defense counsel argued identity to the jury. The Court of Appeals ignored the fact that the trial judge expressly ordered defense counsel not to argue to the jury that it would receive an identity instruction. (A. 87). Likewise, the Court of Appeals disregarded the fact that the trial court expressly instructed the jury "in connection with your determination of the weight of the evidence in this case, I want to say to you that the arguments made by counsel a few moments ago are not evidence." (A.92). Nevertheless, the Court of Appeals holds, for the first time, that defense counsel's argument to the jury is an adequate substitute for the court's instruction to the jury. As Judge Swygert stated in his dissenting opinion, (App. 26):

> "***Summation of counsel at the close of the evidence***may not substitute for proper instructions to the jury by the court.*** If final argument by counsel were sufficiently pervasive, no instructions by the court would be needed at all."

theory of the case. The evidence in the case
at bar was exceedingly close. The govern-
ment's evidence was far from overwhelming.
In addition, petitioner's total defense that the agents
were mistaken in their identity of him as the
person who dispensed narcotics to them,
petitioner was entitled to an instruction on
his theory and belief. . . .

entitled to such instruction on request. (p. 32).
. . . The Court of Appeals held that refusal
to give this requested instruction was error
that the trial judge could not be relieved
[by] . . . The Court of Appeals declared
that the trial judge could not be relieved
[of] not to assume the jury that it would
[necessary] [illegible] (p. 32).
. . . the Court of Appeals disregarded
the duty of the trial judge to instruct the jury
[in] case, I want to say to you that it
[illegible] must be governed by [illegible]
not evidence. (p. 32). Nevertheless,
[illegible] for the petitioner
[illegible] the jury in
[illegible] to the effect [illegible]
in his theory of the case. (p. 32).

"[illegible] requested at the close
[illegible] evidence [illegible]
[illegible] proper instruction to the jury
[illegible] [illegible] that petitioner
[illegible] entitled [illegible] positive,
to instruction by the court would be
needed at all.

The majority holding of the Court of Appeals is utterly fallacious! Had defense counsel's identity jury argument been fortified by an instruction from the court, the jury's verdict on this extremely close evidence might very well have been different.

The majority of the Court of Appeals in the instant case attempted to distinguish Salley vs. U.S., (D.C. Cir., 1965), 353 Fed. 2d. 898. The distinction is ludicrous. In SALLEY, so holds the court in the instant case, (App. 12), the defendant was identified as the seller of the narcotic drugs by only one agent, whereas in the case at bar, so holds the Court, (App. 14), petitioner was identified, not by one agent, but rather by three agents. Yet, the one identifying agent in SALLEY was one with whom the defendant personally conversed and to whom the defendant directly dispensed the drugs as opposed to the tangential "peeps" of the three agents in the instant case.

Judge Swygert in his dissenting opinion in the instant case stated, (App.25):

> "I believe that the Salley decision lays down the correct rule of law. And contrary to the view of the majority, I think the respective factual situation in SALLEY and this case are sufficiently analogous to render the two cases legally indistinguishable."

Had the author of the majority opinion in the case at bar devoted his talents to applying SALLEY, rather than to formulating subtle distinctions, the instant judgment of conviction would likewise have been reversed.

In reversing the judgment of conviction in SALLEY, the Court stated, 353 Fed. 2d. 897, P. 898-899:

> "It is reversible error for the court to refuse on request to instruct also as to the defendant's theory of the case. *** The principal announced in Levine, (261 Fed. 2d. 747, 748), has particular application to a defense based on lack of proper identification in a narcotic case.
>
> * * *
>
> "Often the only chance a defendant has to defend himself without accusing the officer of total fabrication is to raise in the jury's mind a reasonable doubt as to whether the defendant was, in fact, the seller. A requested instruction specifically bringing this defense of mistaken identity to the jury's attention in a narcotics case must be given. *** He was obligated to instruct the jury that if there was a reasonable doubt as to the identification of the defendant as the person who made the sale, then the jury should acquit."

As the Fifth Circuit Court of Appeals held in Strauss vs. U.S., 376 Fed. 2d. 416, P. 419:

> "It is elementary law that the defendant in a criminal case is entitled to have presented instructions relating

to a theory of defense for which there is any foundation in the evidence. *** The judge must therefore be cautious and unparsimonious in presenting to the jury all the possible defenses which the jury may choose to believe. *** Where there has been some evidence relevant to that defense adduced at trial, then the trial judge may not refuse to charge on that defense. *** He is entitled to have such instruction even though the sole testimony in support of the defense is his own. *** The jury did not have to believe the defense, but it should have been given the opportunity. This is true even if the defense is fragile. A DEFENDANT CANNOT BE SHORT-CHANGED NOR HIS JURY TRIAL TRUNCATED BY A FAILURE TO CHARGE." (Emphasis ours).

Petitioner did not receive a fair trial by jury. It was "truncated by a failure to charge." His right of appellate review was depleted by absurd distinctions. Even the Seventh Circuit itself held in Indian Trailer Corporation vs. U.S., 266 Fed. 2d. 595, at page 598:

"The defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. *** The defendants were entitled to have an instruction

based upon their theory of the case. *** We hold failure to give such instruction was error."

And see the Seventh Circuit's opposite decision in U.S. vs. Dichiarinte, 385 F.(2)333. We pray that the writ be granted.

II

REFUSAL TO GRANT HEARING ON PRE-ARREST AND PRE-INDICTMENT DELAYS.

The majority decision in the case at bar on pre-arrest and pre-indictment delays conflicts with the decisions of the Court of Appeals for the District of Columbia in Ross vs. U.S., 349 Fed. 2d. 210; Godfrey vs. U.S., 358 Fed. 2d. 850; Lee vs. U.S., 363 Fed. 2d. 834; Woody vs. U.S., 370 Fed. 2d. 214; Nickens vs. U.S., 320 Fed. 2d. 808, 812-814. It was on March 30, 1965 that petitioner was arrested and charged with having on December 7, 1964 unlawfully sold a narcotic drug to Donald W. Tucker. Thus, there was a delay of three months and twenty-four days between the commission of the offense and petitioner's arrest therefor. Petitioner was held over to the District Court Grand Jury on the charge on the date of his arrest, but it was on June 17, 1965, two months and nineteen days later, that the indictment was returned. Petitioner requested a hearing on the unreasonableness, purposefulness and prejudice of the delay, and moved

to dismiss the indictment if the evidence adduced on the hearing established same. (A.7-21). The trial court summarily denied petitioner's Motion for a hearing and to dismiss, and stated, (A.43):

> "First, the delay in indicting this defendant; and I don't think that the Ross case applies to the facts in this case, and I don't think that there was any prejudice by the delay that occurred here, and I also question the Ross case; and so, on all those grounds, that motion is denied. *** The Motion to Dismiss is denied."

Obviously, by denying petitioner a hearing on the delays, petitioner was absolutely precluded from establishing the prejudice to him occasioned by the government's pre-arrest and pre-indictment delays. The Court of Appeals affirmed the trial court ruling on the hereafter stated grounds, none of which are supported by any evidence, but each of which could and would have been refuted and rebutted had the trial court granted petitioner a hearing.

> (1) "The trial judge was then (after trial) in an excellent position to make his determination. (App.20). (The trial judge during the course of the trial heard no delay evidence but only the admissible evidence of the commission of the alleged offense and petitioner's defense thereto.)

(2) "The investigation had begun on December 3, 1964 and had been consistently continued thereafter." (App.20).

(3) "The identity of not only the undercover agent, but also that of the informant, required protection." (App.20).

(4) "When the informant was murdered, the need for protection terminated, and the defendant was arrested." (App. 20).

(5) "There were three agents who positively identified the defendant, BUT NONE OF WHOM TESTIFIED FROM NOTES." (App. 21).

(6) "The prosecutor is entitled to reasonable time to investigate to determine whether prosecution is warranted and to prepare his submission to the grand jury." (App. 22).

It was indeed unfair to petitioner for the trial court to summarily deny petitioner a hearing on the delay and an opportunity to present evidence of the unreasonableness of the delay and the prejudice to petitioner's defense occasioned by the delay. It was equally unfair to petitioner for the Court of Appeals to affirm the delay hearing denial on the aforestated grounds in the total absence of any evidentiary support thereof and without giving petitioner an opportunity to refute same.

(2) "The [illegible] had begun on December 5, 1956 and had been consistently conducted thereafter." (App. 19).

(3) "The [illegible] not only the undercover agent, but also that of the informant, required protection." (App. 20).

(4) "... [illegible] was [illegible], the need for [illegible] terminated, and the [illegible] arrested." (App. 20).

(5) "... [illegible] agents who positively [illegible], BUT [illegible] [illegible] FROM [illegible]." [illegible].

(6) "... [illegible] is entitled to reasonable [illegible] to consult with [illegible] during [illegible] is arranged for by the [illegible] his solicitor." (App. 22).

[illegible] petitioner for the [illegible] petitioner a reasonable opportunity to prepare [illegible] the [illegible] of the [illegible] petitioner's detention [illegible] the [illegible] petitioner for [illegible] [illegible] to adjourn the delay hearing [illegible] on the aforesaid [illegible] in the light of any evidentiary [illegible] and [illegible] petitioner an opportunity to refute [illegible].

Judge Swygert quite correctly points out in his dissenting opinion that the District Judge heard no evidence on the presentation of the post trial motions or on the pre-arrest and pre-indictment delay issue. (App.27). Nor was any such evidence received during the trial. Judge Swygert likewise correctly points out in his dissenting opinion, (App. 29-30), that the majority holding on the pre-arrest and pre-indictment delay issue in the case at bar diametrically conflicts with the ROSS, WOODY, LEE and GODFREY decisions.

The Seventh Circuit Court of Appeals held in U.S. vs. Panczko, 367 Fed. 2d. 737, P. 738, in which Judge Swygert joined, that the only limitation on delay in a criminal prosecution is the Statute of Limitations. But Judge Swygert, "upon further reflection", as expressed in his dissenting opinion in the case at bar, has retreated from this untenable position. (App.28).

We respectfully submit that the ever recurring problem of pre-arrest and pre-indictment delay and the inevitable attendant prejudice to an accused, particularly in narcotic cases, should be guide-lined and resolved by This Court. The ROSS formula, 349 Fed. 2d. 210, is a desirable and workable one. The ROSS formula is: (1), a defendant is entitled to an evidentiary hearing to establish prejudice to his defense occasioned by the delay; (2), the government is required to show that the delay is not purposeful and unreasonable;

and, (3), upon balancing these two considerations, the District Court should predicate the indictment dismissal ruling on the reasonableness and purposefulness of the delay, as equated with its attendant prejudice to the defendant's defense. In any event, the legal principles governing pre-arrest and pre-indictment delays should not be inconsistent among the Circuit Courts of Appeals, as is now the case.

III.

REFUSAL TO PRODUCE GRAND JURY TESTIMONY.

Petitioner's right to a government trial witness' grand jury testimony cannot be defeated by the dubious tactic of refusing to record the witness' grand jury testimony, or the trial witness' convenient inability to recollect whether he testified before the grand jury.

In the case at bar, each of the three government witnesses, all Federal narcotic agents, had an identical lapse of memory and neither could recollect whether he testified before the grand jury. Defense counsel's motion that the trial judge order the government trial attorney to make a determination of whether the witnesses testified before the grand jury was denied. (App. 53-55; 60-61; 63-75; 79-82). It subsequently developed on appeal, pursuant to an order of the 7th Circuit Court of Appeals on oral argument, that the

witnesses' testimony was not recorded.

In direct conflict with This Court's holding in Dennis vs. U.S., 384 U.S. 855, 16 L. Ed. 2d. 973, 985-987; Worthy vs. U.S., 352 Fed. 2d. 718, 384 U.S. 894, 16 L. Ed. 2d. 1000; Lee vs. U.S., 363 Fed. 2d. 469; Leon V. U.S., 384 U.S. 882; Natl. Dairy vs. U.S., 350 Fed. 2d. 321, 384 U.S. 883, 16 L. Ed. 2d. 995; U.S. vs. Konisberg, et. al., 354 Fed. 2d. 1007, 384 U.S. 884, 16 L. Ed. 2d. 997, the Appeals Court in the instant case has held that petitioner's right to government witnesses' grand jury testimony can be circumvented and defeated by a convenient lapse of memory or refusal to record. In addition, the Appeals Court in the instant cause yet tenaciously hangs on to the discarded and antiquated "particularized need", concept and requirement. (See U.S. vs. Cole, 365 Fed. 2d. 57, in which the Seventh Circuit flatly refused to even discuss This Court's holding in DENNIS, let alone follow it, and in which three justices of This Court voted for granting the petition for Writ of Certiorari, 385 U.S. 1027.) Surely, a holding of This Court cannot be so adroitly circumvented.

IV.

THE FELONY CONVICTION INSTRUCTION.

The holding of the Court of Appeals that it was not error or an abuse of discretion

on the facts in this case for the trial judge to instruct the jury that a felony conviction affected petitioner's credibility conflicts with the holdings of the Court of Appeals for the District of Columbia in Brown vs. U.S., 370 Fed. 2d. 242, and Luck vs. U.S., 348 Fed. 2d. 763, 766-769.

Petitioner testified to his seventeen year employment record in private industry and that during which, on three occasions, he obtained additional Christmas employment at the U.S. Post Office, and that ten years ago, 1953, he, along with fifty or sixty others, was discharged from his postal employment because he misinterpreted the employment questionnaire to mean if he had ever been convicted of crime, and he answered no because he had not been, when the questionnaire meant if he had ever been arrested; and he was placed on probation therefor for two years. (A.77-78, 79). The government presented no evidence to the jury of what offense petitioner had been convicted or that the offense was a felony.

Although the trial judge blatantly refused to instruct the jury on petitioner's theory and defense, it nevertheless accommodatingly submitted the government's instruction to the jury on petitioner's credibility being affected by a felony conviction, even though there was no evidence submitted to the jury that petitioner had ever been so convicted. Assuming that it was a felony for which petitioner had been convicted ten years previously because of his misinterpretation of an employment questionnaire - "had he ever

been arrested?", in pursuit of honest gainful employment, it is indeed questionable whether such a conviction under these circumstances could be raised to the legal import of affecting credibility. The trial court erred in instructing the jury that it did, and the Appeals Court's affirmance thereof conflicts with Brown vs. U.S., 370 Fed. 2d. 242, in which the Court held:

> "There may well be other cases where the trial judge believes the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility. *** This is a classic illustration of the case in which the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility."

And Luck vs. U.S., 348 Fed. 2d. 763, P. 766-769, in which the Court stated at page 769:

> "The trial court is not required to allow impeachment by prior conviction every time a defendant takes the stand in his own defense.
>
> * * *
>
> "In exercising discretion in this respect, a number of factors might be relevant such as the nature of the prior crime, the length of the criminal record, the age and circumstances of the defendant, and, above all, the extent to which it is more important to search for truth

in a particular case for the jury to hear the defendant's story than to know of prior conviction. The goal of the criminal trial is the disposition of the charge in accordance with the truth. The possibility of a rehearsal of the defendant's criminal record in a given case, especially if it means that the jury will be left with one version of the truth, may or may not contribute to that objective. The experienced trial judge has a sensitivity in this regard which normally can be relied upon to strike a reasonable balance between interest of the defendant and of the public.

* * *

"The matter is, we reiterate, one for the exercise of discretion;***"

And see U.S. vs. Steinback, 7th Cir., 10/14/68, No. 16259, P. 5-7; U.S. vs. Pinna, 229 Fed. 2d. 216, P. 219.

We importune this Honorable Court to grant this Petition for Writ of Certiorari.

Respectfully submitted,

Sam Adam
134 N. LaSalle
Chicago, Ill
CE 6-5543

R. Eugene Pincham
Earl E. Strayhorn
Charles B. Evins
840 E. 87th Street, Suite 201
Chicago, Illinois 60619
994-2600
Attorneys for Petitioner

in a particular case for the jury to hear the defendant's story than to know of prior conviction. The goal of the criminal trial is the disposition of the charge in accordance with the truth. The possibility of a reversal of the defendant's criminal record in a given case, especially if it means that the jury will be left with one version of the truth, may or may not contribute to that objective. The experienced trial judge has a sensitivity in this regard which normally can be relied upon to strike a reasonable balance between interest of the defendant and of the public.

* * *

"The matter is, we reiterate, one for the exercise of discretion;"

[illegible]

Respectfully submitted,

[illegible]

Attorneys for Petitioner

[illegible]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

September Term, 1967 April Session, 1968

No. 16106	) Appeal from the United
United States of America,	) States District Court
Plaintiff-Appellee,	) for the Northern District
v.	) of Illinois, Eastern
IRVING NAPUE,	) Division.
Defendant-Appellant.	)

September 6, 1968

Before Knoch, Senior Circuit Judge and Swygert and Cummings, Circuit Judges.

Knoch, Senior Circuit Judge. The defendant-appellant, Irving Napue, was tried on an indictment charging, in Count I, an unlawful sale of narcotics to Donald W. Tucker, and, in Count II, an unlawful concealment of narcotics in violation of Title 26 U.S.C. Section 4705 (a) and Title 21 U.S.C. Section 174. A third count charging violation of Title 21 U.S.C. Section 174 was dismissed on motion of the United States prior to trial.

The defendant's motion for acquittal on the sale count was granted by the Trial Judge. The jury found the defendant guilty under the concealment count. Defendant was sentenced to serve six years' imprisonment.

The defendant has appealed his conviction asserting as reversible errors the following:

1. The Court refused to instruct the jury on the defendant's theory of the case.

2. The Court refused to order the prosecution to determine whether government witnesses had testified before the Grand Jury and to order production of the transcript of any such testimony, if available, for defense counsel's use in cross-examination.

3. The Court instructed the jury respecting the defendant's prior criminal conviction.

4. The Court refused to dismiss the indictment for delay in bringing charges or to hold a hearing on the reasonableness of such delay and its possible prejudice to the defendant.

5. The Court denied a motion for bill of particulars respecting the time and place of commission of the offense, which defendant argues was necessary to minimize the prejudicial effect of the delay in bringing charges.

I.

Special Agent Donald W. Tucker of the United States Secret Service testified that in December 1964 he was employed as a narcotic agent for the Federal Bureau of Narcotics. He said that on December 7, 1964, after a conference with other agents William Reibel and Robert DeFauw, from whom he received $400 of officially advanced funds, he visited the home of an informant, Cathy Bullock, where he listened on an extension to a telephone call she made to Mildred Howell, whose voice he recognized, that he and Miss Bullock then met Agents Reibel and DeFauw and a Chicago policewoman at 76th and Wentworth Avenue, in Chicago, Illinois, after which they drove to the vicinity of 84th Street and St. Lawrence Avenue, where, at about 8:00 P.M., Mildred Howell came up to his vehicle and had a conversation with him, whereupon all three entered the basement of Mildred Howell's residence at 8352 S. St. Lawrence Avenue. Mildred Howell left them but at about 8:30 P.M. Agent Tucker heard the front door bell and Mildred Howell came down. He gave her $375 of the $400 he had previously received, and when he heard her footsteps going toward the front of the house, he went up a flight of stairs, looked around and out of the half open door at the head of those stairs into the front hall which was "kind of lighted up" although the rear of the house was in darkness, and observed in profile Mrs. Howell

and the defendant who were standing facing each other. He saw her hand the defendant a quantity of money and heard her ask, "Is the stuff good?" to which the defendant replied, "Yes, it is good. You can tell whoever is getting it they are going to be pleased with it." Defendant then handed Mrs. Howell a plastic bag which appeared to contain a white powder. As Mrs. Howell walked toward the basement door, Agent Tucker returned to the basement where she joined him in 5 or 10 seconds and handed him a plastic bag containing white powder. Miss Bullock and he returned to 76th and Wentworth where he gave the plastic bag to Agent DeFauw whom he saw perform a Marquis Reagent Field Test on some of the powder. A positive reaction was noted indicating the presence of an opiate.

Federal Narcotics Agent Robert DeFauw testified that after the conference with Agents Reibel and Tucker, he and Agent Reibel, who was driving, went to 75th and S. Wentworth where he saw Agent Tucker park his vehicle and enter Miss Bullock's residence and at about 7:15 P.M. saw both leave for 76th and S. Wentworth where he met them. He then followed them to 84th and St. Lawrence, saw Agent Tucker's vehicle parked and maintained surveillance. At about 8:00 P.M. he saw Mildred Howell approach the car and then saw all three walk toward St. Lawrence. He followed on foot till they came alongside the house at 8352 St. Lawrence and then came alongside the house at 8352 St. Lawrence and then returned to his vehicle.

At about 8:25 P.M. he saw a black livery cab (whose make and license number he did not observe) double park in front of 8352 St. Lawrence and the defendant leave the cab to enter 8352 St. Lawrence. Defendant stresses the fact that Agent DeFauw was three or four car lengths north of the house with other automobiles parked on the street, it was dark and cold with snow on the ground. Agent DeFauw testified that there was a light on the porch. Five minutes later Agent DeFauw saw the defendant leave 8352 St. Lawrence and return to the cab. He followed it to 84th and So. Ellis, saw the defendant leave the cab and enter what he thought was 8352 S. Ellis, an apartment building. Again defendant points out that Agent DeFauw was three or four car lengths behind with other automobiles on the street between him and the livery cab. After that Agent DeFauw went back to 8352 St. Lawrence where he saw Agent Tucker and Miss Bullock leave the Howell residence, and get into Agent Tucker's car. He followed them to 76th and S. Wentworth where he received a plastic bag from Agent Tucker, performed a Marquis Reagent Field Test with a positive reaction.

Federal Narcotics Agent Vernon D. Meyer testified that about 8:00 P.M. on December 7, 1964, he was in the 8300 block of S. Ellis in a radio car in communication with Agent DeFauw.

At about 8:20 he saw defendant come out of the apartment building at 8352 S. Ellis, about ten car lengths away, and enter a black livery taxicab, the make and license number of which he did not know. He said that he thought it was a Dodge or Plymouth. The defendant argues that had these agents noted the license it would have been simple to check with the company and to ascertain who had hired the cab and possibly to secure the driver as a witness who would have had a better opportunity to identify his passenger than the three agents who saw the man for such short periods of time. Agent Meyer said he saw the cab go to 8352 S. St. Lawrence, saw the defendant leave it and enter the building. He waited about five minutes, saw defendant come out, return to the cab and go back to 8352 S. Ellis, where Agent Meyer remained conducting surveillance till he received a radio communication.

The defendant testified that he did not recall where he was on December 7, 1964, but that he did know he had not been in Mrs. Howell's home on that day, that he had never been there, that he had neither given her a plastic bag nor taken any money from her, that he had never been on St. Lawrence Avenue in or out of a cab, that he first learned at the trial that he was alleged to have been in the Howell home on December 7, 1964, that he could not recall having known Mrs. Howell prior to that date although he knew her husband

and had met her a year possibly two prior to the trial which was held in November, 1966. He said further that he first heard of Miss Bullock after he was arrested, that he had not sold narcotics to Agent Tucker or to anyone else on December 7, 1964. He offered to submit to any tests to prove he was telling the truth. He had been working at a grill and bar for two years, prior to which he had worked at Republic Steel and at a bicycle firm. He did not remember where he was arrested. He had lived at 860 Hudson Street for almost a year and prior to that at 8352 S. Ellis, where he was living in December 1964.

The defendant tendered two instructions readins as follows:

> The court instructs the jury that the identity of the defendant must be proved beyond all reasonable doubt. And you are instructed that so far as the identity of the defendant is concerned that if you believe from the evidence and the circumstances proved that there is a reasonable doubt whether the prosecuting witnesses might not be mistaken as to the identity of the defendant then the jury would not be authorized to convict the defendant.
>
> In determining whether or not the witnesses, who testified that they

> recognized the defendant as being the same person who committed the offense might or might not be mistaken in their identification of him, the jury have a right to, and should take into consideration the lapse of time intervening between the date of the commission of the crime charged and the occasion and circumstances under which the witnesses saw the defendant after his arrest, together with the circumstances under which the witnesses saw him on that occasion and from all the circumstances in evidence, it is for the jury to determine whether or not said witnesses or witness are mistaken.

The Trial Judge refused to give these instructions on the ground that they were argumentative instructions,, that, of course, counsel could argue these questions to the jury, but that this went to the whole crux of the case: whether the officers did or did not see this defendant at the time in question, but that he was not going to take one piece of evidence in the case and single that out for particular attention. He did not review, summarize or comment on the evidence.

Defense counsel argued the theory of mistaken identity at great length to the jury.

The government also referred to both issues: mistaken identity and credibility of the witnesses, also emphasizing the question of identification.

Defendant contends that the jury was never advised of the defendant's theory of the case, relying on Salley v. United States, D.C. Cir., 1965, 353 F. 2d. 897, 898. There the Trial Court instructed the jury that the government must prove beyond a reasonable doubt that the defendant had committed every element of the offense with which he was charged and then referred to the specific facts of the case as follows:

> If you find by proof beyond a reasonable doubt that the defendant sold the drug involved in this case to Officer Brooks on September 3rd, and the elements of the offenses are proven beyond a reasonable doubt, you may find the defendant guilty. If, however, you find that the defendant did not make the sale, of course, you will find the defendant not guilty on each count. And if you have a reasonable doubt as to whether the defendant did or did not make the sale, you will also find the defendant not guilty.

adding:

> (D) efendant denies that he made any such sale and takes the position that

if Officer Brooks did buy these six capsules on September 3rd, he must have bought it (sic) from someone else....

The defense sought to have the jury instructed:

"You are instructed that the identity of the defendant as the person who committed the crime is an element of every crime. Therefore, the burden is on the Government to prove beyond a reasonable doubt not only that the crime alleged was committed, but also that the defendant was the one who committed it.

"***You must be satisfied beyond a reasonable doubt of the accuracy of the witness' identification of the defendant.

"In this regard, you are instructed that it is not necessary for the defendant to prove that another person may have committed the crime, nor is the burden on the defendant to prove his innocence. If facts and circumstances have been introduced into evidence which raise a reasonable doubt as to whether the defendant was the person who committed the crime charged, then you should find the defendant not guilty of the offense."

App. 10.

The D.C. Circuit referred to the particular dangers raised by the local practice (to which we refer below) of having one undercover agent file for as many as 100 warrants after a tour of duty lasting for a number of months and the obvious possibility of error due to mistake or fallibility of human memory of an agent who meets many people buying from some and not from others, so that a requested instruction bringing the defense of mistaken identity to the jury's attention in a narcotics case must be given, though not necessarily in the words requested by counsel.

The Court went on to note that some jurors may have drawn the conclusion that their primary task was to determine whether Officer Brooks was mistaken in his identification, but that the matter was too important to be left to speculation. The Court's view on this point may have been to a degree influenced by the numerous other grounds which were not discussed at any length but which the Court held would independently require reversal. One such ground which is mentioned was the Trial Court's unreasonable failure on request to ask on voir dire whether any of the jurors were inclined to give more weight to the testimony of a police officer merely because he was a police officer than any other witness in the case (which had been held reversible error in Sellers vs. United States D.C. Cir., 1959, 271 F. 2d. 476, 477; Brown v. United States, D.C.,

Cir., 1964, 338 F. 2d. 543, 544).

The circumstances which gave such concern to the D.C. Circuit do not exist here. There were three identifying officers, not merely one. Nothing suggests that identification was complicated by multiple unrelated narcotics purchases. The agents here were obviously expecting this defendant. An agent in one government vehicle in radio communication with the others was waiting near the defendant's home. Continuing interest was maintained in defendant. The record shows a reference to the defendant's having seen Agent DeFauw on September 15, 1965.

In Salley, the Court relied on Levine v. United States, D.C. Cir., 1958, 261 F. 2d. 747, 748, for the principle that the Trial Court may not refuse to instruct on the defendant's theory of the case. The Court there said (at page 749) that the jury should not have been influenced by the Court's charge to concentrate unduly upon one side of the conflicting evidence as to whom defendant represented himself to be. The defendant, an attorney, was charged with representing himself to be a police officer when interviewing the prosecuting witness. He testified that he represented himself accurately to be an attorney for one of the defendants and an officer of the Court whose duty it was to find out what happened so that he could protect his client. The D.C. Circuit held it was error to deny a more balanced charge when the request

had the support of substantial evidence.

This Court also reversed a conviction on the ground of an unfairly balanced comment on the evidence in United States v. Dichiarinte, 7 Cir., 1967, 385 F. 2d. 333. The defense argued that the agents were mistaken but the government contended that the main issue was credibility. In the course of argument the government counsel asserted that somewhere there was perjury, although the defense had not charged the agents with dishonesty, and intimated that the defense charged the agents with framing the defendants, that witnesses on one side or the other must be lying, and that the agents would have no reason to lie.

Judge Fairchild speaking for this Court said that the Trial Court in its instructions seemingly adopted the prosecution's position that either the agents or the defense witnesses lied witnout balancing that comment by a reminder that the jury were free to consider the defense theory of mistake.

We are inclined to think that some instruction (not necessarily in the form offered by the defense) on mistaken identity would have been the better practice here, but we find its omission in the circumstances of this case to be mere harmless error. As in United States v. DeSisto, 2 Cir., 1964, 329 F. 2d. 929, 934, cert. den. 377 U.S. 979, the issue of mistaken

identity was clearly made in the course of examination as to the circumstances under which the three agents saw the man they identified as the defendant and was thoroughly argued in the summation to the jury who could not possibly have been misled.

II.

None of the three government agent witnesses were able to state positively on cross-examination that they had not testified before the Grand Jury which returned the indictment on which this case was tried. Agent Tucker did not think he had testified before any Grand Jury about these matters but did not specifically state he had not done so. Although government counsel advised the Court that he could ascertain by examining the Grand Jury minutes whether these agents had testified, the Court declined to order him to make that check.

No particularized need for such testimony was shown. This trial was held prior to this Court's ruling (to be solely prospective in effect) in United States v. Amabile, 7 Cir., 1968, 395 F. 2d. 47, that in the future the defense might have access to a witness' Grand Jury testimony on the subjects about which he testified unless the government could show that access should be denied. In Amabile, Judge Cummings speaking for this Court carefully

distinguished Dennis v. United States, 1966, 348 U.S. 855, on which defendant here relies, where counsel for the defense did show a particularized need, where the prosecution used the Grand Jury transcript at the trial, where there was a seven-year time lag between the Grand Jury and the trial testimony, and the Court was trying charges of a complex conspiracy fifteen years after the fact, involving largely uncorroborated testimony of two accomplices, one a paid informant, a possibly hostile witness and one who on cross-examination admitted prior mistakes about significant dates.

The defendant here made no timely request for the Grand Jury testimony while Agent Tucker or Agent Meyer were on the stand, but only when Agent DeFauw was testifying. The government argues with reason that the motion was untimely as to the first two. National Dairy Products Corp. v. United States, 8 Cir., 1967, 384 F. 2d. 457, cert den. 390 U.S. 957.

The Trial Judge asked government counsel whether he had in his files any Grand Jury minutes or transcript relating to the testimony of any of the agents and was answered in the negative. Counsel said he did not know if any had testified before the Grand Jury, but that the case was initially handled by another attorney.

Pursuant to order of this Court, government counsel checked the records on file in the United States Attorney's office and reported that

they disclosed the following: Agent Donald W. Tucker was the sole witness in June 1965 before the Grand Jury which returned the initial indictment (referred to below) and Agent William W. Raebel was the only witness before the January 1966 Grand Jury which returned the indictment on which this case was tried, however no reporter was present on either occasion and no transcript of the testimony exists.

III.

The Court instructed the jury:

> The testimony of a witness may be discredited or impeached by showing that he had been convicted of a felony. Prior conviction does not render a witness incompetent to testify, however it may reflect on his credibility. It is the province of the jury to determine what weight, if any, should be given to such prior conviction as impeachment.

In the course of direct examination defendant testified that in making an application for employment at the U.S. Post Office he had answered "no" to an inquiry as to whether he had ever been arrested, believing, he explained, that "arrest" included conviction and he had never been sent to jail although he had been arrested, that this statement was the subject of a charge in the Federal Court and that he had been placed on

probation. On cross-examination defendant said that he was placed on probation for two years and that this must have been ten years ago. In framing his questions government counsel referred to a specific case by number, date and disposition, and the defendant agreed with some of his statement, particularly as to the two years' probation, but said he did not remember anything else clearly. No further testimony was adduced from defendant as to the specific charge, but the Trial Judge obviously took judicial notice of the Court records. See U.S. v. Austrew, D.C. Md., 1962, 202 F. Supp. 816, 821, afd. 5 Cir., 1963, 317 F. 2d. 926, cited with approval in Chandler v. U.S., 9 Cir., 1967, 378 F. 2d. 906, 909.

Making a known false statement of a material fact is a felony under Title 18 U.S.C., Sec. 1001. A conviction for making a false statement surely has probative value on the issue of credibility. Luck v. United States, D.C. Cir., 1965, 348 F. 2d. 763, 769, on which defendant relies, holds that suppression of a prior conviction is a matter for the exercise of sound discretion. No prior motion to suppress the conviction was made as in Brown v. United States, D.C. Cir., 1966, 370 F. 2d. 242. Defendant himself initially raised the prior offense.

IV.

The defendant was arrested by agents of the Federal Bureau of Narcotics on March 30, 1965, taken before a United States Commissioner

the same day on a complaint for examination alleging a sale of narcotics to Donald W. Tucker on December 7, 1964. Defendant waived preliminary hearing.

On June 17, 1965, an indictment in two counts was returned and a bench warrant issued for defendant's arrest. The defendant moved to dismiss that indictment arguing then, as he did later on appeal here, that needless and unreasonable delay between the date of the offenses, December 7, 1964, and the arrest on March 30, 1965, and the further delay between the defendant's holdover to the Grand Jury and the return of the indictment on June 17, 1965, in derogation of Rule 48 of the Federal Rules of Criminal Procedure hampered preparation of any defense by precluding his recall of his whereabouts and activities on December 7, 1964, and his location of any possible witness, while the government was in no way adversely affected because its agents would have made contemporary memoranda of the events from which they could testify. He stated that he had resided at the same address continuously and could have been arrested at any time. Defendant requested a hearing. No hearing was held. The Trial Judge denied the motion indicating that he thought Ross v. United States, D.C. Cir., 1965, 349 F. 2d. 210, was inapplicable and that prejudice had not resulted from the delays which had occurred here.

In Ross, the Court was concerned about a pattern of cases and its supervisory responsibility for criminal proceedings involving the District of

1. Rule 48. Dismissal***(b) By Court. If there is unnecessary delay in presenting the charge to a gran jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

Donald W. Trueler
Defendant waived pre-

an indictment in two
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and the return
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Ross v. United
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Columbia Metropolitan Police force. In Ross, the complaint was sworn out seven months after the alleged offense and the D.C. Circuit thought the Trial Court's finding of "requirements of effective law-enforcement" an adequate justification for a deliberate and purposeful delay of seven months. This delay in filing complaint was occasioned by police reluctance to terminate the usefulness of a particular undercover agent by untimely disclosure of his identity. The D.C. Circuit considered it essential to strike a balance in pooice work to avoid the complete sacrifice of one or another impinging interests. In a footnote to the opinion (at page 213) the Court referred to numerous sales made to the same undercover agent during the last three months of his work with the implication that three months was clearly not an unreasonable delay, but added:

> Whatever the outer limits of such a period may be, the point is that, being purposeful, the delay should result only from arrangements which reflect a conscious effort to accommodate fairness and efficiency.

On January 25, 1966, the original indictment of June 17, 1965, was superseded by the three-count indictment on which the defendant was tried. The first two counts were similar to those of the initial indictment. Defendant's motions to the first indictment were allowed to stand as motions to the second.

In his suggestions in support of his motion to dismiss, the defendant denied any knowledge of the crime, asserted his innocence, protesting his lack of recollection and inability to find any witnesses.

He also said on information and belief that although he kept no dairy, the government witnesses did have memoranda without which they would also be unable to testify to the events of December 7, 1964. He indicated later in his objections to consolidation of his case with that of Mildred Howell that he intended to call her as a witness at his trial.

We do not agree that the Trial Judge abused his discretion in waiting to appraise the reasonableness of the delay in the light of what would be disclosed at and after the trial. The defendant renewed his motion after trial. The Trial Judge was then in an excellent position to make his determination. The investigation had begun on December 3, 1964 and had been consistently continued thereafter. The identity of not only the undercover agent, but also that of the informant, required protection. When the informant was murdered, the need for protection terminated, and the defendant was arrested.

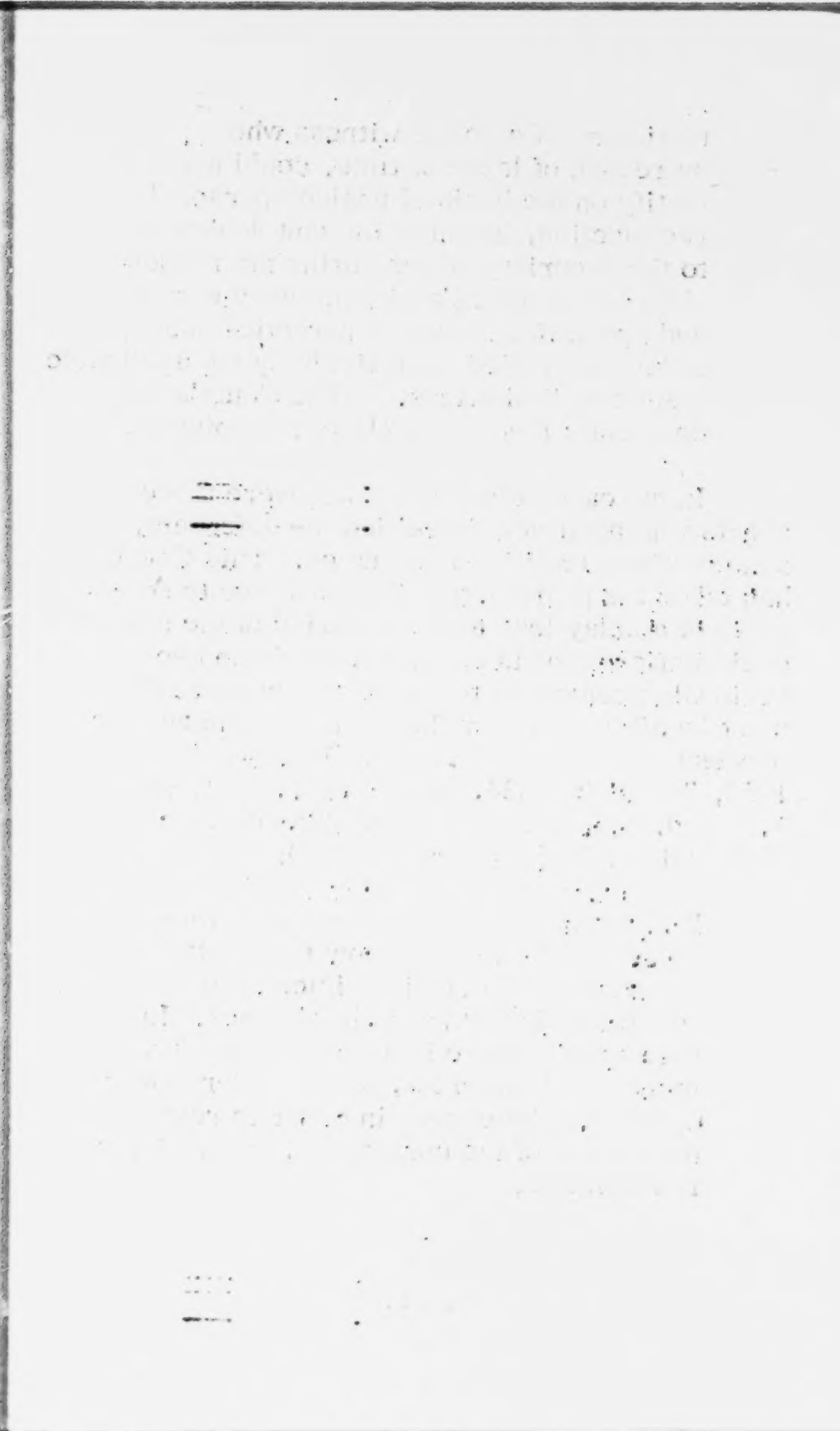
Unlike Ross where the Court's concern was aroused because:

> The recurring spectacle of convictions based solely upon the

testimony of a police witness who, by reason of lapse of time, could not testify on the basis of unaided personal recollection, began to implant doubts as to the propriety of permitting the reasonableness of the delay in this very narrow and specialized class of narcotics cases, to be "controlled exclusively by the applicable statute of limitations." (The Court's emphasis; from page 215 of the opinion).

In the case before us, there were three agents who positively identified the defendant, none of whom testified from notes. This Court has taken the position that it is possible to conceive of a delay less than the period of the statute of limitations that is so unreasonable and so seriously prejudicial to the defendant that relief must be afforded under the Fifth Amendment due process provisions. U.S. v. Deloney, 7 Cir., 1968, 389 F. 2d. 324, rehrg. den., cert. den. 20 L. ed. 2d. 417. As Senior Circuit Judge Duffy said there (at pages 325-326):

> It is apparent that some pre-indictment delay usually is necessary to the effective prosecution of certain crimes such as counterfeiting or narcotic offenses. In such cases, there is a great necessity, in the public interest, to use under-cover agents and informers in order to reach the source of the contraband. Some delay is inevitable.



In Deloney the pre-indictment delay was six months. In United States v. Panczko, 7 Cir., 1966, 367 F. 2d. 737, rehrg. den., cert. den. 385 U.S. 1009, rehrg. den. 386 U.S. 1043, a pre-indictment delay of fourteen months, and in United States v. Evans, 7 Cir., 1967, 385 F. 2d. 824, 826, of ten and one-half months, were held to be reasonable. In Evans, the Court noted that the defendant (like the defendant here) claimed to have no recollection of what occurred on the date of the offense but denied ever having seen the agent-buyer.

As to post arrest delays, totalling some eleven weeks, we find no abuse of discretion in the Trial Court's holding these to be reasonable. The prosecutor is entitled to a reasonable time to investigate to determine whether prosecution is warranted and to prepare his submission to a grand jury. See Crow v. United States, 8 Cir, 1963, 323 F. 2d. 888, 890-891, where nine and one-half months were held reasonable. We do not believe that the time lapses in this case show any lack of diligence in the prosecution of the case.

At the time defendant sought to dismiss the indictment on the basis of delay in arrest, he also sought a bill of particulars concerning the exact location in Chicago of the alleged sale to Donald Tucker, the hour of the day on December 7, 1964, the names of those present and their last known addresses, the amount of payment, if any, those present at the receipt of such payment and their last known addresses, all referring

specifically to Count I. We agree with the government's assertion that most of the items suggest that defendant was seeking to ascertain the nature of the government's evidence rather than the nature of the charge.

But defendant was convicted on Count II, not on Count I. Although defendant's motion for acquittal on Count I was allowed, he contends he was nevertheless prejudiced by denial of his motion, arguing that he was misled by the charge that he sold narcotics to Donald Tucker when the evidence ultimately showed that Mildred Howell had actually sold to Donald Tucker narcotics allegedly provided her by the defendant. However, as the government points out, long before trial, defendant indicated in his objections to consolidation that he proposed to call Mildred Howell as a witness, and the government in its answer to those objections disclosed that the proof against the two would be substantially identical.

After careful consideration of all points raised and argued and close scrutiny of all the authorities brought to our attention, we conclude that the defendant received a fair trial and that no prejudicial error appears in the record before us. The judgment of the District Court must be affirmed.

Affirmed.

No. 15106

Swygert, Circuit Judge, dissenting.

I dissent for two reasons. First, I believe that the district court erred in refusing to give, in substance at least, the requested identification instructions. In Salley v. United States, 353 F. 2d. 897 (D.C. Cir. 1965), the court reversed the conviction of a defendant charged with a narcotics violation. One of the issues was whether the defendant was the perpetrator of the offense. The principal ground for reversal was the failure of the trial court to give an instruction on identification. There the court said:

> The widespread police practice of utilizing undercover agents and informers to infiltrate the narcotics underworld is effective and necessary. But it creates added danger that the innocent may be convicted. ... Often the only chance a defendant has to defend himself without accusing the officer of total fabrication is to raise in the jury's mind a reasonable doubt as to whether the defendant was, in fact, the seller. A requested instruction specifically bringing this defense of mistaken identity to the jury's attention in a narcotics case must be given. The trial judge was

> not obligated to give the charge in exactly the words requested by defense counsel. He was obligated to instruct the jury that if there was a reasonable doubt as to the identification of the defendant as the person who made the sale, then the jury should acquit, 353 F. 2d. at 898, 899.

I believe that the Salley decision lays down the correct rule of law. And contrary to the view of the majority, I think the respective factual situations in Salley and this case are sufficiently analogous to render the two cases legally indistinguishable. Moreover, this court, in United States v. Dichiarinte, 385 F. 2d. 333 (7th Cir. 1967), inferentially recognized the need for an instruction of the kind that was refused in the instant case.

The government attempts to excuse the district court's failure to instruct specifically on the identification issue by arguing in its brief:

> Having challenged only the identification evidence, defendant's strategy left but two arguments open to the parties: mistaken identity and credibility. While defendant proceeded to argue the mistaken identity theory over the course of nineteen transcript pages, the Government not only referred to both theories during its closing argument

> but also devoted the greater part of its reply to the theory of identification, concluding its discussion with the statement: "We rely upon these trained investigators that their identification of the defendant is clear and positive...."

In my opinion, summation of counsel at the close of the evidence, however explicit or porlonged, may not substitute for proper instructions to the jury by the court. The proposition advanced by the Government, carried to its logical conclusion, might be expanded so that if final argument by counsel were sufficiently pervasive, no instructions by the court would be needed at all.

The second reason for my dissent centers on the district court's failure to conduct a hearing on the defendant's motion to dismiss the indictment because of the delay in his arrest. The district court, prior to the trial, summarily denied the motion after refusing to conduct an evidentiary hearing, saying:

> First, the delay in indicting the defendant; and I don't think that the Ross case applies to the facts in this case, and I don't think that there was any prejudice by the delay that occurred here, and I also question the Ross case; and so, on all those grounds, that motion is denied...the motion to dismiss is denied...

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...ly direct certain
...ded to conduct a hearing
...n the defendant's motion to dismiss the indict-
...ment because of the delay in its arrest. The
district court, after a full hearing, summarily
denied the motion and refusing to conduct an
evidentiary hearing, said:

...first, the delay in inditing the defen-
dant; and I don't think that this case
came anywhere to the facts in this case,
and I don't think that there was any
prejudice by the delay that occurred
here, and I also question the Rose case,
...on all those grounds, that
...tion is denied, the motion to
dismiss is denied...

...

The majority excuses the district court's failure to conduct a hearing on this issue by saying, "We do not agree that the Trial Judge abused his discretion in waiting to appraise the reasonableness of the delay in the light of what would be disclosed at and after the trial." The motion to dismiss was renewed at the close of the trial, but the record fails to disclose that the district judge received any additional facts at that time.[1]

Although I do not believe that it was necessary to conduct an evidentiary hearing and to dispose of the defendant's motion to dismiss the indictment on the ground of prejudicial delay in bringing the charge prior to trial, I think that such a pre- trial hearing would be the most expeditious and desirable course to follow. A pre-trial hearing would eliminate the possibility of mingling other evidence with the evidence of delay, as occurred in this case. Such a procedure would allow the district court to focus on the delay issue alone. In addition, a pre-trial hearing, if the allegations of delay were proved, would eliminate the necessity of conducting a

1. The record shows the following statement by the district judge with reference to the post-trial motions: I have looked over the post trial motions. It seems to me that all that the defendant has done in the post-trial motions is to raise the same issues that were previously argued and passed upon. I find nothing new in any of the post-trial motions that hasn't already been argued. On that basis, the post trial motions are denied.

trial.

In United States v. Deloney, 389 F. 2d. 324, 325 (7th Cir. 1968), this court, after referring to our previous decision in United States v. Panczko, 367 F. 2d. 737, 738 (7th Cir. 1966), cert. denied, 385 U.S. 1009 (1967), in which we held that "the government is entitled to a reasonable time in which to investigate a case...and prepare it for prosecution, limited only by the statute of limitations,"[2] stated:

> We think we should concede that it is possible to conceive of a delay less than the period of the Statute of Limitations that would be so unreasonable and the prejudice to defendant so great that relief under the Fifth Amendment should be afforded.

Thus in Deloney we recognized the constitutional principle, as delineated in Nickens v. United

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2. Although I concurred in the opinion in United States v. Panczko, upon further reflection, I believe that our decision there was too restrictive. Panczko failed to leave open the possibility that due process may prevent measuring the timeliness of bringing charges against an accused by reference solely to the applicable statute of limitations.

States, 323 F. 2d. 808, 810 (D.C. Cir. 1963), and confirmed in Ross v. United States, 349 F. 2d. 210, 211 (D.C. Cir. 1965), that "due process may be denied when a formal charge is delayed for an unreasonably oppressive and unjustifiable time after the offense to the prejudice of the accused." Although the ratio decidendi in Deloney is somewhat obscure, we did say, referring to Ross and its progeny in the District of Columbia Circuit:

> We think we can distill from these decisions the rule that before that Court will dismiss an indictment because of pre-indictment delay, an accused must show he has been prejudiced by the delay. Then, the burden is on the Government to show the delay was the result of a valid police purpose. 389 F. 2d. at 325.

The question of a separate hearing on the issue of delay was not raised in the briefs in Deloney nor did this court sua sponte direct that a hearing be conducted. In Ross as well as in several cognate decisions, e.g., Woody v. United States, 370 F. 2d. 214 (D.C. Cir. 1966); Lee v. United States, 368 F. 2d. 834 (D.C. Cir. 1966), the cases were remanded to the district court for a hearing on the reasonableness and effect of the pre-indictment delay. I

believe that a similar remand should be ordered in the instant case.

I would reverse and remand for a hearing on the motion to dismiss and, depending on the result of that hearing, a new trial.

A True Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Seventh Circuit.

TITLE 21, SECTION 174, U.S.C.

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such act in violation of the laws of the United States, shall be imprisoned not less than five nor more than twenty years and, in addition, may be fined not more than $20,000.00."

"Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Judge Win G. Knoch was appointed and took the oath to the United States Court of Appeals for the Seventh Circuit on September 15, 1958, 256 Fed. 2d. XIII. During his ten year tenure on the Court, revealed by our research hereafter set forth, he has sat on 234 cases of criminal and habeas corpus appeals. He has authored only two opinions in favor of a defendant; U.S. vs. Mesheski, 286 Fed. 2d. 345, which held that a tax consultant's embezzlement of funds entrusted to him for tax payments was not tax evasion under Title 26, Section 145 (b) U.S.C.; and U.S. vs. Wilcher, 332 Fed. 2d. 117, which held that evidence and repeated references to a government witness' guilty plea to the unlawful possession of interstate stolen tractors, (obtained from the defendant), as alleged in Count II of the indictment, in which the government witness was singularly charged, was reversible error on the defendant's trial under Count I, in which the defendant was singularly charged with the unlawful possession of the same interstate stolen tractors. Our research further reveals that Judge Knoch has authored 75 pro-prosecution opinions out of the 234 criminal and habeas corpus cases on which he has sat. His pro-prosecution dissents are not here included. Our research discloses no pro-defendant dissents authored by him. Following are the citations to the 234 criminal and habeas corpus cases on which he sat. The "K" after the citations indicates that Judge Knoch authored the opinion.

1. 259 Fed. 2d. 761 K (Habeas Corpus)
2. 260 Fed. 2d. 508 K
3. 261 Fed. 2d. 234 (Habeas Corpus)
4. 261 Fed. 2d. 609
5. 262 Fed. 2d. 871 K
6. 263 Fed. 2d. 518
7. 263 Fed. 2d. 597
8. 263 Fed. 2d. 594
9. 264 Fed. 2d. 353 K
10. 264 Fed. 2d. 424 (Habeas Corpus)
11. 264 Fed. 2d. 628 K
12. 265 Fed. 2d. 660 (Habeas Corpus)
13. 266 Fed. 2d. 92 K
14. 266 Fed. 2d. 310 K
15. 267 Fed. 2d. 106 K
16. 267 Fed. 2d. 180 K
17. 267 Fed. 2d. 600 K
18. 271 Fed. 2d. 80 K
19. 271 Fed. 2d. 644
20. 272 Fed. 2d. 106
21. 273 Fed. 2d. 5
22. 273 Fed. 2d. 459 K
23. 274 Fed. 2d. 117
24. 274 Fed. 2d. 611
25. 274 Fed. 2d. 874 K
26. 275 Fed. 2d. 77 (contempt)
27. 275 Fed. 2d. 318
28. 276 Fed. 2d. 96 K
29. 276 Fed. 2d. 245
30. 277 Fed. 2d. 560
31. 277 Fed. 2d. 566 K Count I reversed (5 years) Count II affirmed (20 years).
32. 277 Fed. 2d. 613 K
33. 279 Fed. 2d. 202 K (Habeas Corpus).
34. 279 Fed. 2d. 793
35. 279 Fed. 2d. 833
36. 279 Fed. 2d. 924
37. 280 Fed. 2d. 74
38. 280 Fed. 2d. 493
39. 281 Fed. 2d. 93 K
40. 281 Fed. 2d. 225 (contempt)
41. 282 Fed. 2d. 748
42. 283 Fed. 2d. 399
43. 284 Fed. 2d. 461 K
44. 284 Fed. 2d. 464
45. 284 Fed. 2d. 489 K
46. 285 Fed. 2d. 548
47. 285 Fed. 2d. 688
48. 285 Fed. 2d. 696 K
50. U.S. v. Mesheski, 286 Fed. 2d. 345 K (reversed)
51. 286 Fed. 2d. 753
52. 287 Fed. 2d. 236
53. 287 Fed. 2d. 292 K
54. 287 Fed. 2d. 633
55. 288 Fed. 2d. 236
56. 289 Fed. 2d. 352
57. 291 Fed. 2d. 100
58. 291 Fed. 2d. 535
60. 294 Fed. 2d. 371

61. 295 Fed. 2d. 339 K (Habeas corpus)
62. 295 Fed. 2d. 356
63. 296 Fed. 2d. 461 K
64. 297 Fed. 2d. 503 K
65. 297 Fed. 2d. 799 (Habeas corpus)
66. 299 Fed. 2d. 511
67. 300 Fed. 2d. 424
68. 300 Fed. 2d. 19
69. 300 Fed. 2d. 465
70. 300 Fed. 2d. 836
71. 301 Fed. 2d. 293 K
72. 301 Fed. 2d. 299 K
73. 302 Fed. 2d. 537 (Habeas Corpus)
74. 303 Fed. 2d. 661
75. 303 Fed. 2d. 602 K
76. 303 Fed. 2d. 666
77. 303 Fed. 2d. 745
78. 304 Fed. 2d. 853 K
79. 305 Fed. 2d. 774 K
80. 307 Fed. 2d. 590
81. 307 Fed. 2d. 585
82. 308 Fed. 2d. 369
83. 308 Fed. 2d. 586 (Habeas Corpus)
84. 309 Fed. 2d. 311
85. 309 Fed. 2d. 367
86. 310 Fed. 2d. 367
87. 310 Fed. 2d. 409
88. 310 Fed. 2d. 696 K
89. 312 Fed. 2d. 161 K (Habeas Corpus)
90. 312 Fed. 2d. 155 K (govt. appealed rev. and remanded
91. 312 Fed. 2d. 159 K
92. 313 Fed. 2d. 857
93. 313 Fed. 2d. 848
94. 313 Fed. 2d. 875
95. 313 Fed. 2d. 153
96. 314 Fed. 2d. 127 K
97. 314 Fed. 2d. 345
98. 316 Fed. 2d. 589
99. 316 Fed. 2d. 647 K
100. 318 Fed. 2d. 436
101. 318 Fed. 2d. 559
102. 319 Fed. 2d. 5 K
103. 321 Fed. 2d. 287 K
104. 322 Fed. 2d. 265
105 323 Fed. 2d. 405
106. 323 Fed. 2d. 410 (Habeas Corpus)
107. 324 Fed. 2d. 934 (Habeas corpus)
108. 324 Fed. 2d. 115
109 325 Fed. 2d. 502
110. 327 Fed. 2d. 715
111. 327 Fed. 2d. 222
112. 327 Fed. 2d. 765 K
113. 327 Fed. 2d. 959 K
114. 328 Fed. 2d. 754 K
115. 328 Fed. 2d. 760
116. 329 Fed. 2d. 339
117. 329 Fed. 2d. 354 (Habeas corpus)
118. 330 Fed. 2d. 126 (Habeas corpus)
119. 331 Fed. 2d. 766 K
120. 331 Fed. 2d. 232 K
121. 331 Fed. 2d. 214
122. 332 Fed. 2d. 199
123. 332 Fed. 2d. 117 K (rev. and remanded for a new trial.)

124. 332 Fed. 2d. 425 K
(Habeas corpus)
125. 332 Fed. 2d. 36
126. 333 Fed. 2d. 649
127. 334 Fed. 2d. 781 K
128. 334 Fed. 2d. 787
129. 334 Fed. 2d. 837
(Habeas corpus)
130. 335 Fed. 2d. 299 K
131. 337 Fed. 2d. 385
132. 338 Fed. 2d. 605
133. 338 Fed. 2d. 582
134. 338 Fed. 2d. 595
135. 339 Fed. 2d. 404
136. 339 Fed. 2d. 932
137. 339 Fed. 2d. 987
138. 339 Fed. 2d. 1003
139. 340 Fed. 2d. 23 K
140. 340 Fed. 2d. 243
141. 340 Fed. 2d. 254 K
142. 340 Fed. 2d. 259
143. 340 Fed. 2d. 848
144. 340 Fed. 2d. 913
145. 341 Fed. 2d. 44 K
146. 341 Fed. 2d. 85
147. 341 Fed. 2d. 325 K
148. 341 Fed. 2d. 555
149. 341 Fed. 2d. 885 K
(Habeas corpus)
150. 342 Fed. 2d. 593 K
151. 343 Fed. 2d. 115
152. 343 Fed. 2d. 533
153. 345 Fed. 2d. 372 K
154. 345 Fed. 2d. 392
155. 345 Fed. 2d. 354
156. 345 Fed. 2d. 431 K
157. 345 Fed. 2d. 691
(Habeas corpus)
158. 346 Fed. 2d. 253 K
159. 346 Fed. 2d. 278
160. 346 Fed. 2d. 329
161. 346 Fed. 2d. 363
162. 346 Fed. 2d. 371
163. 347 Fed. 2d. 405
164. 347 Fed. 2d. 448
165. 347 Fed. 2d. 505 K
166. 347 Fed. 2d. 691
167. 350 Fed. 2d. 587
168. 351 Fed. 2d. 910 K
(Habeas Corpus)
169. 352 Fed. 2d. 910
170. 354 Fed. 2d. 568
171. 354 Fed. 2d. 633
172. 355 Fed. 2d. 453
173. 355 Fed. 2d. 527
174. 355 Fed. 2d. 883
175. 355 Fed. 2d. 879 K
(Habeas corpus)
176. 358 Fed. 2d. 60 K
177. 358 Fed. 2d. 142
178. 359 Fed. 2d. 732
179. 359 Fed. 2d. 772 K
180. 359 Fed. 2d. 749
(Habeas corpus)
181. 359 Fed. 2d. 802 K
182. 359 Fed. 2d. 809
183. 359 Fed. 2d. 828 K
(Habeas corpus)
184. 360 Fed. 2d. 127
185. 360 Fed. 2d. 905

186. 360 Fed. 2d. 925
187. 362 Fed. 2d. 151
188. 362 Fed. 2d. 462
189. 362 Fed. 2d. 151
190. 363 Fed. 2d. 333 K
191. 365 Fed. 2d. 21
192. 365 Fed. 2d. 57
193. 365 Fed. 2d. 148
194. 365 Fed. 2d. 135 K
195. 369 Fed. 2d. 465
196. 371 Fed. 2d. 160
197. 371 Fed. 2d. 295
198. 371 Fed. 2d. 405 K
199. 372 Fed. 2d. 61 K
200. 372 Fed. 2d. 70
201. 372 Fed. 2d. 67
202. 373 Fed. 2d. 307
203. 374 Fed. 2d. 486
204. 374 Fed. 2d. 744
205. 375 Fed. 2d. 75
206. 375 Fed. 2d. 901
207. 375 Fed. 2d. 226
208. 379 Fed. 2d. 424 K
209. 379 Fed. 2d. 483
210. 379 Fed. 2d. 645
211. 381 Fed. 2d. 961 K
212. 383 Fed. 2d. 680
213. 384 Fed. 2d. 905
214. 385 Fed. 2d. 200
215. 385 Fed. 2d. 210
216. 385 Fed. 2d. 487
217. 387 Fed. 2d. 895
218. 387 Fed. 2d. 923
219. 387 Fed. 2d. 1009 K
220. 388 Fed. 2d. 246
221. 389 Fed. 2d. 324
222. 389 Fed. 2d. 629 K
223. 393 Fed. 2d. 172
224. 394 Fed. 2d. 327
225. 394 Fed. 2d. 922
226. 396 Fed. 2d. 952
227. 397 Fed. 2d. 381
228. 397 Fed. 2d. 409
229. 398 Fed. 2d. 29 K
230. 398 Fed. 2d. 32
231. 398 Fed. 2d. 64
232. 398 Fed. 2d. 658 K
233. 399 Fed. 2d. 705
234. U.S. v. Napue K
(the case at bar)